SENSITIVE

FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463

FIRST GENERAL COUNSEL'S REPORT

CELA

MUR: 6675
DATE COMPLAINT FILED: Oct. 25, 2012
DATE OF NOTIFICATION: Nov. 1, 2012
DATE OF LAST RESPONSE: Dec. 21, 2012
DATE ACTIVATED: Mar. 12, 2013

EXPIRATION OF STATUTE OF LIMITATIONS:
Oct. 15, 2017
ELECTION CYCLE: 2012

COMPLAINANT:	Kyrsten Sinema for Congress
RESPONDENT:	Vernon Parker for Congress and Kelly Lawler in her official capacity as treasurer
RELEVANT STATUTES: AND REGULATIONS	2 U.S.C. § 431(22) 2 U.S.C. § 431(24) 2 U.S.C. § 441d(a)(1) 11 C.F.R. § 110.11 11 C.F.R. § 100.26 11 C.F.R. § 100.28
INTERNAL REPORTS CHECKED:	None
FEDERAL AGENCIES CHECKED:	N/A

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I. INTRODUCTION

This matter involves allegations that Vernon Parker for Congress and Kelly Lawler in her official capacity as treasurer (the "Committee") violated the Federal Election Campaign Act, as amended (the "Act"), by failing to include an appropriate disclaimer in automated phone calls

the Committee funded. Compl. at 1. The Complaint specifically alleges that the Committee conducted a telephone "push poll" that provided a negative message about Parker's opponent, Kyrsten Sinema. *Id.* The Complaint argues that, as a public communication, such calls require a disclaimer under the Act and Commission regulations. *Id.*

The Response acknowledges that it paid for the automated calls but contends the calls are not a "public communication" and thus require no disclaimer. Resp. at 2-3. Furthermore, the Response states that the Committee spent only $500 on the calls and Parker ultimately lost the election. *Id.* at 1, 5. Accordingly, the Response argues that the Commission should either find no reason to believe that it violated the Act — given that the calls did not require a disclaimer — or dismiss this matter pursuant to *Heckler v. Chaney*, 470 U.S. 821 (1985). *Id.* at 5.

As set forth below, we conclude the calls here constitute a telephone bank, a form of "general public political advertising," and therefore require a disclaimer under 2 U.S.C. § 441d(a) and 11 C.F.R. § 110.11(a)(1). Nevertheless, based upon the *de minimis* amount in violation, we recommend that the Commission exercise its prosecutorial discretion and dismiss this matter with caution.

II. FACTUAL BACKGROUND

Vernon Parker was a candidate for the United States House of Representatives in Arizona's 9th Congressional District in 2012. Parker designated Vernon Parker for Congress as his principal campaign committee. *See* Statement of Candidacy (Apr. 13, 2012). Kyrsten Sinema was his opponent. Parker lost the general election held on November 6, 2012.

On October 15, 2012, the Committee placed 6,596 automated calls to likely voters in the relevant congressional district. *See* Compl. at 1; Resp. at 4. The first question posed in the calls asked recipients for whom they intended to vote, instructing them to press 1 for Republican

Vernon Parker, 2 for Democrat Kyrsten Sinema, or 3 if undecided. Resp. at 4. The second question began by informing recipients that Sinema once served as a criminal defense attorney and had represented "murderers" and then asked "Do you think Sinema should release her client list?" Compl. at 1; Resp. at 4. Of the 6,596 calls, the Response states that 596 recipients responded to the first question, and 480 responded to the second. Resp. at 4. The Committee later reported that while 44.6% of the respondents stated that they would vote for Parker and 41.7% stated that they would vote for Sinema, 63% of respondents stated that Sinema should release her client list. *Id.* at 5.

The Complaint alleges that the calls constituted a "public communication" but failed to include a disclaimer stating who had paid for them. Compl. at 1. The Complaint further asserts that on October 16, 2012, the day after the calls were placed, the Committee posted a press release on its Facebook page claiming that the calls showed Parker leading the race and that a majority of voters wanted Sinema to disclose her client list. *Id.* at 1, Ex. 1.

The Response concedes that the Committee paid for the calls. Resp. at 4. Nor does it dispute that the calls omitted a disclaimer. *Id.* at 1, 4. The Response contends that these calls required no disclaimer because the calls did not constitute "political advertising" or a "public communication." *Id.* at 1, 3-4. The Response asserts that the calls were "legitimate polling" designed to test a potential campaign message, the results of which shaped Parker's campaign message in the weeks before the election. *Id.* at 4-5. Alternatively, the Response argues that the matter should be dismissed because the total cost of the calls was $500. *Id.* at 5.

III. LEGAL ANALYSIS

The Act provides that whenever a political committee makes a disbursement for "any communication through any broadcasting station, newspaper, magazine, outdoor advertising

facility, mailing, or any other type of general public political advertising," such communication requires a disclaimer. 2 U.S.C. § 441d(a). If the communication is paid for and authorized by a candidate or an authorized committee, then the disclaimer must clearly state that the communication has been paid for by such committee. *Id.* § 441d(a)(1).

The Commission's implementing regulation provides that "all *public communications*, as defined in 11 C.F.R. § 100.26, made by a political committee" must include a disclaimer. 11 C.F.R. § 110.11(a)(1) (emphasis added). Under the Act and Commission regulations, a public communication is "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising." 2 U.S.C. § 431(22); 11 C.F.R. § 100.26. A telephone bank "means more than 500 telephone calls of an identical or substantially similar nature within a 30-day period." 2 U.S.C. § 431(24); 11 C.F.R. § 100.28.

Applying these definitions, we conclude that the calls here are a form of public communication under 11 C.F.R. § 100.26. The Committee paid for 6,956 calls, which were made within a 24-hour period. The calls also used a standardized script. They thus meet the definition of telephone bank. 2 U.S.C. § 431(24); 11 C.F.R. § 100.28. And because the calls satisfied the definition of a telephone bank, the calls satisfy the definition of public communication. *See* 11 C.F.R. § 100.26.

The conclusion that we reach is consistent with prior Commission interpretation. In MUR 5587R (David Vitter for U.S. Senate), the Commission found probable cause to believe that a candidate committee violated 2 U.S.C. § 441d when it conducted telephone polling and placed more than 500 substantially similar calls within a 30-day period. *See* MUR 5587R (David

Vitter for U.S. Senate); *see also* MURs 5584, 5585 (Unknown Respondents) (finding reason to believe that respondents violated 2 U.S.C. § 441d where evidence suggested that more than 500 calls using the same script were made within a 30-day period).

The Response points to MUR 5835 (Democratic Congressional Campaign Committee) and argues that "[t]he Act does not require a disclaimer for survey, research, or polling telephone calls." Resp. at 1 (citing Statement of Reasons, Comm'rs. Petersen, Hunter, and McGahn in MUR 5835 (Democratic Congressional Campaign Committee) (July 1, 2009) ("SOR")).[2] The Response first asserts that the plain language of the statute does not require a disclaimer for telephone polls. *Id.* at 1-2 (citing SOR at 5, MUR 5835). The Response argues that the Commission "conflated" the term "communication," as used at 2 U.S.C. § 441d, and "public communication," as defined at 2 U.S.C. § 431(22), when promulgating 11 C.F.R. § 110.11 and consequently required a telephone bank to include a disclaimer as a public communication. *Id.* at 2 (citing SOR at 5, MUR 5835).

The Commission, however, interpreted the statute differently when it promulgated regulations to implement the 2002 Bipartisan Campaign Reform Act ("BCRA"). In its Explanation and Justification ("E&J"), the Commission stated that Congress "expanded the disclaimer requirement to reach disbursements to finance 'any communication' made by political committees through any type of general public political advertising . . . ." 67 Fed. Reg. 76,962,

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[2] In MUR 5835, the Commission did not approve the General Counsel's recommendation to find probable cause to believe that the DCCC violated 2 U.S.C § 441d by a vote of two to three. The SOR of the three dissenting Commissioners argued that the Act does not require disclaimers for telephone polls and that the telephone calls in question did not constitute a telephone bank under Commission regulations because they were not a form of general public political advertising. *See* SOR at 4-9, MUR 5835. Although the SOR asserted that the term "push poll" has no legal significance because the Act does not define that term, the SOR posited that push polls engage in candidate advocacy and are therefore distinguishable from legitimate public opinion polls, which are designed to collect information without bias. *See* SOR at 9-10, MUR 5835. Nevertheless, the SOR noted that even if the polling casts a candidate in a negative light, such polling does not necessarily become "general political advertising" under the Act and Commission regulations. *Id.* at 12.

76,962 (Dec. 13, 2002). Although the Commission noted some differences in the language between the term "communication" in the disclaimer provision at 2 U.S.C. § 441d(a) and the statutory definition for "public communication" at 2 U.S.C. § 431(22), the Commission decided to treat the two terms identically based upon how Congress used these terms in BCRA. 67 Fed. Reg. at 76,963. The Commission therefore determined that each form of communication specifically listed in the definition of public communication and each form of communication listed in the disclaimer statute "must be a general form of 'general public political advertising.'" *Id.* Consequently, because 2 U.S.C. § 431(22) includes telephone banks to the general public as a form of general public political advertising, telephone banks to the general public are general public political advertising under 2 U.S.C. § 441d(a) as well. *Id.*

Second, the Response disputes that the calls here constitute a telephone bank. *See* Resp. at 4-5. Instead, the Response distinguishes between telephone banks and telephone polls. *Id.* The Response contends that, whereas the purpose of a telephone poll is to collect information so that a political campaign may learn about the public, test potential messages, and develop campaign strategies, a telephone bank is to "inform the recipient of a certain policy or action" and is often a form of political advertising. *Id.* at 3. And, the Response argues, the Act does not reach telephone polls because they are not "general public political advertising." *Id.* Therefore, the Response reasons, because the calls here were a telephone *poll*, rather than a telephone *bank*, the calls were not "general public political advertising" and did not require a disclaimer. *Id.* at 4-5.[3]

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[3] In support of its argument, the Response relies heavily upon the SOR in MUR 5835. In that SOR, discussed *supra* n. 2, three Commissioners took the view that 2 U.S.C. § 441d does not extend to "legitimate poll[s]" but suggested that the disclaimer requirements would extend to "advocacy telephone communications." SOR at 11, MUR 5835. The SOR put forth three questions, an affirmative answer to any one of which would indicate that the subject poll was "legitimate survey research." *Id.* at 11-12. The questions are whether "the respondent [was] on the phone for more than three or four minutes;" the caller ask[ed] the respondent about his or her age or party

But neither the Act nor Commission regulations draw such a distinction. The definition of telephone bank looks to the number of calls made, whether the calls are "identical or substantially similar," and whether the calls are made within a 30-day period. *See* 2 U.S.C. § 431(24); 11 C.F.R. § 100.28. And as discussed above, the Commission has already determined in the course of a rulemaking that "public communications" by political committees require disclaimers and that "public communications" include telephone banks. Moreover, in MUR 5587R (David Vitter for U.S. Senate), the Commission rejected an argument similar to the one the Response makes here. *See generally* Resp. to Gen. Counsel Brief at 6, MUR 5587R (David Vitter for U.S. Senate) (arguing that 2 U.S.C. § 441d did not reach calls "made for polling or research purposes").

Although the factual record here indicates that the Committee should have included a disclaimer in its calls, the Committee spent only $500 on the calls, and the candidate lost the election. In past matters, the Commission has dismissed disclaimer allegations involving like amounts in violation as *de minimis*. *See, e.g.*, MUR 6558 (Jenkins) (dismissal where reported cost of calls was $75); MUR 6125 (McClintock for Congress) (dismissal with caution based in part on potentially small amount in violation); MUR 6034 (Manion for Congress) (dismissal with caution where cost of communications appeared to be $1,038.80). Because the Committee included no identifying information about who paid for the calls, however, we believe that a cautionary letter is appropriate. Accordingly, we recommend that the Commission exercise its prosecutorial discretion and dismiss the allegation that the Committee violated 2 U.S.C.

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affiliation;" and whether "the caller ask[ed] more than five or six questions." *Id.* This test has not been accepted by a majority of the Commission. *See, e.g.*, Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg. 76,962 (Dec. 13, 2002); MUR 5587R (David Vitter for U.S. Senate); MURs 5584, 5585 (Unknown Respondents). Assuming *arguendo*, however, that the Commission adopted this test, the calls here could satisfy it. We do not know how long the calls lasted, but only two questions were asked, implying a brief exchange between the caller and respondent. Further, the caller did not request the respondent's age or party affiliation, only who the respondent intended to vote for.

§ 441d(a) and 11 C.F.R. § 110.11(a)(1) by failing to include an appropriate disclaimer in a public communication, and issue a letter cautioning the Committee. *See Heckler*, 470 U.S. at 821.

IV. RECOMMENDATIONS

1. Dismiss the allegation that Vernon Parker for Congress and Kelly Lawler in her official capacity as treasurer violated 2 U.S.C. § 441d(a) and 11 C.F.R. § 110.11(a)(1) but send a letter of caution;
2. Approve the attached Factual and Legal Analysis;
3. Approve the appropriate letters; and
4. Close the file.

Anthony Herman
General Counsel

June 07, 2013
Date

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